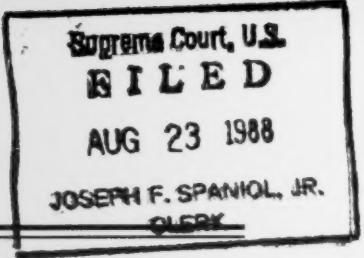


(3)
No. 87-2083



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

THE MOZART COMPANY, a corporation,
Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC., a corporation,
Respondent.

**BRIEF OF AMICUS CURIAE AUTOMOTIVE
WAREHOUSE DISTRIBUTOR ASSOCIATION IN
SUPPORT OF PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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The Automotive Warehouse Distributors Association ("AWDA") submits this brief *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the petitioner The Mozart Company ("Mozart").

I. Interest of AWDA in Outcome

AWDA is an association whose members are warehouse distributors (WDs) and manufacturers of automotive replacement parts. There are over 500 WD members in AWDA, plus 244 manufacturer affiliates.

The WD members of AWDA are engaged in the business of distributing automotive replacement parts through independent jobbers and franchised automobile dealers. The WDs sell broad

lines of automotive parts, typically including parts for foreign cars. Parts are obtained from the aftermarket divisions of automobile manufacturers (e.g., Ford Motorcraft) or from independent aftermarket manufacturers (e.g., Champion Spark Plug Co.). WDs sell parts to jobbers for resale to service stations, other mechanics and "do-it-yourselfers." They also sell parts to franchised car dealers for use in servicing cars or for resale to consumers.

The majority of the manufacturer affiliates of AWDA are independent aftermarket manufacturers. That is, they are not affiliated with the automobile manufacturers. Many of the manufacturers produce replacement parts which can be used in Mercedes-Benz automobiles. Neither Daimler-Benz Aktiengesellschaft ("DBAG") nor Mercedes-Benz of North America ("MBNA") is a member of AWDA.

The outcome of the present case will have direct and indirect effects on AWDA members. Many of the manufacturer members produce parts for sale to Mercedes-Benz dealers, and many of the WDs sell replacement parts to Mercedes-Benz dealers. As of 1976 over 21% of all replacement parts purchased by Mercedes-Benz dealers for use in repairs or for resale to consumers were produced and sold by independent manufacturers and WDs. The tying arrangement instigated by MBNA, if permitted to continue, would foreclose absolutely all parts sales by AWDA members to Mercedes-Benz dealers.

There would also be indirect effects. MBNA is not the only automobile distributor seeking to prevent dealerships from purchasing replacement parts from independent distributors. For example, a recent decision in the district court in New Hampshire involved an attempt by Subaru of America to tie the sale of its cars to its dealers to purchases of replacement parts. *Grappone, Inc. v. Subaru of New England, Inc.*, 534 F. Supp. 1282 (D.N.H. 1982). The result obtained by MBNA in this case, if not reversed, will make it more inviting for other automobile distributors to impose or enforce similar tying policies. The effect of such tie-ins of cars and replacement parts would, of course, injure the ability of AWDA members to compete for sales to automobile dealers. The cumulative effect

of multiple tying arrangements between manufacturers and dealers would cause widespread injury to AWDA members.

II. Reasons for Granting the Writ

A. MBNA Was Collaterally Estopped from Relitigating Issues Decided in the Metrix Case

The Mozart case was the second in a pair of identical suits challenging the tying arrangement imposed on Mercedes-Benz dealers by MBNA. In the first decision, the jury rejected the business justification defense, and found MBNA's tie-in to be a violation of section 1 of the Sherman Act, 15 U.S.C. § 1. *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987), *cert. denied*, ____ U.S. ____ (1988); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987). The outcome in the present case, that the tie-in was protected by the business justification defense, should have been precluded by *res judicata* and collateral estoppel.

The doctrine of *res judicata* is that "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The related doctrine of collateral estoppel precludes a party in a later action from relitigating issues that were actually litigated and necessary to the outcome of an earlier action, even if the second cause of action is different from the first cause of action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). As ruled in *Parklane*, the party asserting collateral estoppel in the second action need not have been a party in the first cause of action, so long as the party against whom collateral estoppel is asserted, or its privies, was a party to both actions.

The illegality of the MBNA tying agreement and the business justification defense for that agreement were, using the words of Justice Harlan in *Southern Pacific Railway v. United States*, 168 U.S. 1, 48 (1897), "distinctly put in issue and directly determined" in the Fourth Circuit. MBNA should not have been permitted to relitigate the issues of the *Metrix* case in *Mozart*.

The Ninth Circuit's refusal to bar relitigation by MBNA of the business justification defense was not based on any asserted lack of finality in the earlier decision. The court acknowledged that the fact that the Fourth Circuit appellate decision in *Metrix* was subsequent to the district court proceedings in *Mozart* "does not bar any preclusive effect that the *Metrix* case may possess." 833 F.2d at 1348. It concluded that the *Metrix* decision "possesses the requisite element of finality." 833 F.2d at 1348.

The only remaining question to determine whether MBNA could relitigate the business justification defense is whether there was sufficient identity of issues in *Metrix* and *Mozart*. There was. In each case, the same party, MBNA, was sued on the same antitrust issues raised by the same provisions in paragraph 9C of the same written Dealer Agreement. The plaintiff in both cases was a WD alleging the same injury. The identical tying agreement was held to be per se illegal under the Sherman Act by the juries in both cases. In both cases MBNA relied upon the so-called business justification defense. The facts in these two cases could not be more similar:

	<u>Mozart</u>	<u>Metrix</u>
Mercedes-Benz of North America a defendant.	yes	yes
Plaintiff a WD.	yes	yes
Tying agreement in Paragraph 9C of Dealership Franchise Agreement alleged to be illegal under Sherman Anti-Trust Act § 1.	yes	yes
MBNA asserted business justification as a defense.	yes	yes
MBNA offered evidence that tying agreement was necessary to protect good will and protect customer expectation.	yes	yes
Jury finding that the MBNA tying agreement is per se violation of Sherman Act.	yes	yes
Jury finding that there is a business justification for the tying agreement.	yes	no

The juries in both cases found a per se violation. Neither appellate court disturbed that finding. The only issue raised by

the decision in the *Mozart* case is whether Mozart proved a business justification for its otherwise per se violation.

Despite the identity of issues in *Metrix* and *Mozart*, the Ninth Circuit held that MBNA was entitled to relitigate its business justification defense. The Ninth Circuit "start[ed] from the proposition that the case before us is based on different evidentiary facts from those in *Metrix*," without identifying what those distinguishing facts were. 833 F.2d at 1348. Of course, the fact that MBNA may have chosen to offer different or more persuasive evidence in the second case is no basis for permitting relitigation of an issue already decided adverse to it. *United States v. Stillman*, 167 F.2d 607, 617 (3rd Cir. 1948), *cert. denied*, 335 U.S. 825 (1948).

The only difference between *Metrix* and *Mozart* specifically identified by the Ninth Circuit was that MBNA argued in *Metrix* that *Pick Manufacturing Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936), established an exception to Sherman Act liability for tying arrangements. This argument was unsuccessful, as was MBNA's argument of business justification. In *Mozart*, MBNA relied solely on the business justification defense, without reliance on *Pick*. However, MBNA's decision not to reargue *Pick* does not alter the fact that the business justification defense was argued in full in *Metrix*, and rejected.

Having noted the irrelevant point that MBNA did not raise the *Pick* defense in *Mozart*, the Ninth Circuit rejected collateral estoppel on the untenable basis that the business justification defense was rejected as a factual determination by the jury rather than as a decision of law by the court:

Metrix did not reject the business justification defense; it merely held that in that case the evidence presented by MBNA to make out that defense was not sufficiently strong to support setting aside a jury verdict that no such defense was established.

833 F.2d at 1348 (emphasis added). But these are precisely the circumstances under which collateral estoppel should be used. MBNA had its day in court to prove the business justification

defense. It failed. Having been provided a full and fair opportunity to make its case, MBNA should not be permitted a second opportunity to adjust its proof and try to prove the same facts before a new jury. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Permitting MBNA to re-argue its case in a Ninth Circuit raises the specter of repeated litigation in the remaining ten circuits.

B. The Decision Was Based Upon an Erroneous Application of the Business Justification Defense

The Ninth Circuit ruled that even assuming a per se violation of the Sherman Act, the tie-in could be permissible if it is imposed for a legitimate purpose and if no less restrictive alternative is available. 833 F.2d at 1349. As noted above, the jury in the *Metrix* case rejected MBNA's proof on these factors, and MBNA should have been estopped from relitigating such issues in this case.

Even if MBNA were not estopped from relitigating the issues settled in *Metrix*, the conclusion that the business justification defense immunizes MBNA's otherwise per se violation is based upon improper jury instructions and inadequate evidence. The instructions that permitted the jury to find a business justification erroneously expanded the justification beyond the bounds necessary to protect the seller's good will.

The relevant portion of the court's instruction was:

In order to establish its business justification defense, defendant must show that the tying arrangement was necessary to protect the quality of the automobiles, and that replacement parts of appropriate quality are unavailable from sellers other than defendant itself. In other words, defendant cannot prevail on the business justification defense unless it has sustained its burden of proving that its tying arrangement is the only way the safety and quality of MB cars can be assured.

833 F.2d at 1350 n.7. However, maintaining safety and quality is not a legitimate goal that justifies a tie-in unless customers would blame MBNA for low quality replacement parts. If, as

is presupposed by the national policy in favor of competition, customers can recognize that MBNA is not at fault for low quality parts produced by a rival parts manufacturer, then there is no need for a tie-in. The customers will either freely choose the lower quality parts to achieve cost savings or they will willingly pay MBNA a higher price to obtain higher quality parts.¹ Under such a hypothesis, there is no legitimate reason to force Mercedes-Benz dealers to carry only MBNA parts.

If the quality difference between MBNA and other parts exceeds the cost difference, there is no need for the tie-in, because the normal forces of competition will result in the dealers' choosing to buy MBNA parts for resale. Conversely, if the quality difference does not exceed the price difference, the tie-in will necessarily harm competition by requiring dealers, and by extension consumers, to pay more for parts than a competitive market would justify. Under either scenario, the tie-in is not legitimately justified unless a flaw in the market would cause consumers to blame MBNA if a lower priced non-MBNA part fails. The jury instructions, however, failed to address the question whether MBNA has any legitimate fear that it will bear the brunt of low quality parts produced or sold by others.

A finding of a legitimate purpose for the tie-in is only the threshold question. It then must be shown that there is no less restrictive means of achieving that goal. As the Ninth Circuit explained: "To exonerate a franchiser's tie-in quality control technique from the antitrust law, there must be a finding that no less restrictive alternative exists." 833 F.2d at 1349. The Fourth Circuit said in *Metrix*: "An asserted business justification cannot salvage a tying arrangement that is otherwise per se unlawful without proof that means less restrictive than the tie-in were not feasible to achieve the desired protection." 828 F.2d at 1040.

This is precisely the finding that should be precluded by the *Metrix* decision, which squarely rejected the finding that there

¹ Of course, AWDA disputes any assertion that parts produced by a manufacturer other than MBNA would be of lower quality. No such evidence has been offered, or could be. But even assuming the MBNA parts are higher quality, there is no legitimate reason for MBNA to force their sale.

is no less restrictive means for MBNA to protect its good will. Even if the jury were free to find otherwise in *Mozart*, the evidence cannot support such a finding.

The Ninth Circuit recognized that it is rare that a party can prove no less restrictive alternative. 833 F.2d at 1349. However, while acknowledging the dearth of prior cases where a party had met its burden of proof on this issue, the court found a suggestion that the defense should be received with less skepticism than it has previously been accorded. 833 F.2d at 1349. On the contrary, the precedents make it clear that the business justification defense must be limited to the very narrowest of circumstances. *United States v. Jerrold Electronics*, 187 F.Supp. 545 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). The Ninth Circuit referred to *Jerrold* as "the most notable exception to the general rejection of the quality control defense." 833 F.2d at 1349 n.6.

The *Jerrold* court held that a servicing tie-in for a newly developing antenna system was economically justified because "the limited knowledge and instability of equipment made specifications an impractical, if not impossible alternative." 187 F. Supp. at 560. However, the court went on to point out that "[a]s the circumstances changed and the need for compulsory service contracts disappeared, the economic reasons for exclusively selling complete systems were eliminated." 187 F.Supp. at 560. Thus, although *Jerrold* had a legitimate purpose and there was no less restrictive means of achieving that purpose, *Jerrold* nonetheless violated the Sherman Act because it did not remove the restriction sufficiently rapidly when circumstances changed.

The differences between *Jerrold* and *Mozart* or *Metrix* are significant. Unlike the newly forming industry in *Jerrold*, the automotive industry is quite mature and the markets for automotive service and replacement parts are very well-developed. Moreover, there are two additional well-accepted less restrictive means by which MBNA could protect its legitimate interests. First, it could provide specifications for its parts to assure they meet legitimate quality standards. Alternatively, MBNA could simply require its dealers to disclose the origin of parts used in the repair of Mercedes-Benz automobiles.

The Fourth Circuit recognized the first of these alternatives in its discussion of *Standard Oil of California v. United States*, 337 U.S.293, 306 (1949):

"[t]he only situation . . . in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied."

The Fourth Circuit then proceeded to review the evidence produced on MBNA's ability to provide specifications to additional manufacturers and found that "[t]his evidence dispelled the notion that it was not feasible to designate preferred manufacturers and provide them with design specifications." 828 F.2d at 1040. It noted that over half of the fast-moving replacement parts sold by MBNA to dealers are manufactured by other companies on the basis of design specifications provided by Daimler-Benz. 828 F.2d at 1040.

The Ninth Circuit conceded that design specifications for replacement parts were possible: "Mozart is right, of course, when it insists that MBNA could have furnished design specifications for Mercedes replacement parts." 833 F.2d at 1351. But the court rejected this as a viable alternative based upon a series of hypothetical problems. Foremost among the problems were the asserted need to "police" the manufacturers and to "punish" franchisees who use inferior parts. 833 F.2d at 1349. But these problems arise when any franchisor sets quality standards. They have not before been accepted as sufficient grounds to permit an otherwise per se violation of the Sherman Act. Competition itself is sufficient to "police" the manufacturers and to "punish" dealers who use inferior parts.

If MBNA wants to be free from unfair blame for defective, non-MBNA replacement parts they could accomplish that end by requiring Mercedes Benz dealers to make a written disclosure to their repair-customers whenever non-MBNA parts are being used. The latter solution is a far less restrictive alternative than the tie-in. The Fourth Circuit has already held in *Metrix* that disclosure and serial identification of MBNA parts would comprise an adequate and less restrictive alternative solution.

Disclosure also has the virtue of putting MBNA's evaluation of Mercedes Benz repair-customer expectation to a market test. If non-MBNA parts do in fact cause repair-customer dissatisfaction and thereby result in a loss of repair business and also impose additional transaction costs, then dealer incentive to use such parts would diminish and customer incentive to insist on MBNA parts would increase. There would, therefore, be no need for a tying agreement. In the event of a performance failure by the non-MBNA part there would be no adverse reflection on MBNA because a disclosure was made in advance as to the origin of the part.

III. Conclusion

For the reasons stated herein, *amicus curiae* Automotive Warehouse Distributors Association respectfully requests that this Court grant the petition of the Mozart Company for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

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